IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~1889~~ 107

HAZEL PALMER, ET AL, *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF JACKSON, ET AL, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

Summary of Argument

Petitioners seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming an order of the United States District Court for the Southern District of Mississippi (Jackson Division) denying injunctive relief to the Petitioners who sought to require the City Officials to open its public swimming pools closed by the respondents after a federal court order integrating these facilities.

Respondents submit that Petitioners have not brought themselves within the considerations governing the review by this Court on Certiorari, controlled by Rule 19 of this Court. This rule provides: "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The character of the reasons which will be considered are thereafter listed in the rule. No listed reason is involved here.

There is here involved the right of a City to close all of its swimming pools to all citizens and not furnish such recreational facilities to any citizen. There is therefore no issue of discrimination on account of race, i.e., no 14th Amendment issue.

The Petition here is predicated on a review of the evidence by this Court and a reversal by this Court of the finding of fact of the court below, i.e., the fact that the closing of the pools to all citizens after an order requiring integration thereof was necessary because the personal safety of all citizens and the maintenance of law and order would be endangered by integrated operation thereof and because integrated pools could only be operated at a large financial loss. Petitioners' entire legal argument is based on this Court's reviewing this evidence and reversing of the findings of the court below. *This Court will not grant Certiorari to so do.*

The court below did not render a decision in conflict with the decision of any other Court of Appeals. Petitioners do not so contend. On the other hand, the decisions of all reported cases dealing with the same issue are in accord with the decision in the court below.

The court below did not render a decision in conflict with any applicable decision of this Court.

This cause involves no substantial issue of general importance. The issue here is limited in scope by the particular facts and circumstances. There is not here involved the broader question of whether a City can close a type of recreational facility after integration without any reason therefor except racial animosity. The right of a City to cease to perform a particular proprietary function would vary depending upon the particular function involved and the factual justification therefor. The burden on this Court of policing the factual justification for every such municipal action would be prohibitive.

Argument—Grounds for Denying Writ

1. *This Petition is an effort to have this Court by certiorari review the evidence.*

In 1963 the City of Jackson was operating segregated swimming pools. The District Court of the Southern District of Mississippi entered a declaratory judgment requiring the integration of swimming pools in the City of Jackson in the case of *Clark* v. *Thompson,* 206 F. Supp. 539, affirmed C.A. 5, 313 F. 2d 637, cert. den. 376 U.S. 951, 11 L.ed. 312.

Thereafter the City of Jackson ceased to operate any swimming pools and no municipal swimming facilities have been open to any citizen of either race since said time.

In August 1965 a petition was filed by Petitioners here seeking injunctive relief against the City and its officials to require the City to reopen the swimming pools. The United States District Court for the Southern District of Mississippi, Jackson Division, denied Petitioners the right to this injunctive relief. There was an appeal to the Fifth Circuit Court of Appeals. The Order of the District Court was affirmed by the Fifth Circuit Court of Appeals on August 29, 1967. Petitioners have failed to attach as an Appendix to their Petition a copy of this decision which is reported 391 F. 2d 324. The pertinent part thereof applicable to the issue here involved is attached hereto as Appendix "A". An order was entered for a rehearing en banc. On October 9, 1969 the prior judgment of the Court of Appeals was affirmed. The majority opinion of the Court of Appeals on the hearing en banc affirming the prior decision of that Court is made Appendix "B" hereto. A dissenting opinion was filed on November 25, 1969 (Petitioners' Appendix A, page 48). On January 7, 1970 a concurring opinion was filed (Petitioners' Appendix A, page 45). It specifically stated:

> "*The final footnote of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual.* The majority opinion had emphasized that 'The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation.' [Majority typed opinion, p. 3]. The majority opinion also noted particularly that 'all parties agreed that they had "had an opportunity to offer any and all evidence desired" ' [p. 3] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record. There is no record basis for such a finding." (Emphasis added.)

Here Petitioners seek a Writ of Certiorari in order that this Court may resolve the factual differences between the majority and the minority opinions in the Fifth Circuit Court of Appeals.

The evidence in the District Court and the findings of fact of the District Court and the findings of fact of the Court of Appeals disclose that while the closing of the swimming pools of the City of Jackson followed the decision in *Clark* v. *Thompson,* supra, that the motive of the City of Jackson was not a desire to discriminate against black people nor to harass and enslave black people and its decision was not made in bad faith but that the decision of the City Council was based on a motive of promoting the peace and general welfare of the Community and avoiding large economic losses from the operation of integrated pools. The lower courts found that there was no proof of any other motives of the City of Jackson in reaching its decision not to perform a purely discretionary proprietory function of operating this one particular recreational facility for members of any race.

The City of Jackson made a discretionary decision which it believed was for the best interest of the City and all citizens thereof. There was nothing before the courts below or before this Court to support a finding that the City was motivated in the decision finally arrived at by racial animosity or discriminatory intent or desire.

The case was tried by stipulation before the District Court on the pleadings and affidavits, but with full opportunity having been offered all parties for the introduction of any evidence desired, *and on the District Court's findings of fact and conclusions of law* (See opinion of the Court of Appeals on hearing en banc, Appendix "B" hereto).

The only evidence offered as to the motive or intent of the City was the affidavit of the Mayor (Petitioners' Appendix B, page 77), which contained the following language:

> "Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools."

There was no evidence to the contrary.

The motive or intent of the City was corroborated by the undisputed proof that although the Clark decision also involved other recreational facilities such as parks, the zoo, golf links, auditoriums, etc., that after the Clark decision no such facilities were closed but all were and are being operated on an integrated basis.

The operation of integrated swimming pools presented a unique problem as to the maintenance of law and order and as to the effect on the economy of the City. Not only would integrated pools be operated at a large loss, but it must be recalled that the operation of swimming pools is a proprietary, not a governmental function, and the City would be liable for damages to anyone using the same should under any circumstances it be held that the City did not provide adequate protection for the safety of the users and the maintenance of law and order[1]. This could endanger the financial stability of the City.

The liability of a City arising out of the operation of such a proprietary function as a swimming pool is established. See the decisions in such cases as *Caporossi* v. *Atlantic City*, N.J., 220 F. Supp. 508, affirmed C.A. 3, 328 F. 2d 620, cert. den. 13 L.ed.2d 35, 379 U.S. 825, *City of Ferguson* v. *Marrow*, C.A. 8, 210 F.2d 520[2]; *Thomas* v. *Potomac Electric Power Co.*, D.C. D.C., 266 F.Supp. 687.

The finding of fact by the District Judge was as follows: (Appendix B)

> "The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of Clark v. Thompson, 206 F. Supp. 539, affirmed 313 F. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time,

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[1] In *Bullock* v. *Tamiami Trail Tours, Inc.*, C.A. 5, 266 F. 2d 326, damages were held recoverable for failure to protect passengers on a bus from assault reasonably foreseeable because of racial prejudice and racial tension in the community.

[2] Cf. *Hitchings* v. *Albemarle Hospital*, C.A. 4, 220 F. 2d 716 (hospital); *City of Orange, Tex.* v. *Lacoste, Inc.*, C.A. 5, 210 F. 2d 939 (a port); *Town* v. *Karpark Corp.*, C.A. 4, 194 F. 2d 616 (parking meters); *Dept. of Treasury* v. *City*, Ind., 60 N.E. 2d 957 (golf course and airport); *Beard* v. *City & County of San Francisco*, 180 P. 2d 744 (hospital); *City of Tyler* v. *Ingram*, Tex., 157 S.W. 2d 184 (park).

and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. *The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner.* Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964." (Emphasis added.)

The Circuit Court of Appeals for the Fifth Circuit on the rehearing en banc stated: (Appendix B)

> "True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis."

And yet here Petitioners seek to have this Court review the evidence, and this in spite of the fact that the findings were not only plainly supported by the evidence but there was no evidence to the contrary.

Petitioners' basic dependence upon a review of the evidence by this Court and finding of fact contrary to the findings of the courts below is evidenced throughout their

Petition. They are asking this Court to ignore the reasons established by the City for closing the pool and the motives therefor, and hold that as a fact the real motivation was "racism"; a deliberate "insult" to the Petitioners; a "marked dislike for black people"; an "insulting continuation of the badges of slavery".

Petitioners' entire legal argument is based upon this Court's review of and reversal of the findings of fact of the courts below, i.e., upon the assumption that it does so.

And yet in *General Talking Pictures* v. *Western Electric*, 304 U.S. 175, 83 L.ed 1273, this Court held:

> ". . . Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co. 263 U.S. 508, 68 L.ed. 413, 44 S.Ct. 164; United States v. Johnston, 268 U.S. 220, 227, 69 L.ed. 925, 926, 45 S.Ct. 95; Alabama Power Co. v. Ickes, 302 U.S. 464, ante 374, 58 S.Ct. 300. There is evidence to support them." (82 L.ed. p. 1275)

In *Southern Power Co.* v. *North Carolina Public Service Co.*, 68 L.ed. 413, 268 U.S. 508, a Writ of Certiorari which had been granted was dismissed when it developed . . . "That the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, —primarily a question of fact."

2. *The Writ cannot be justified on the ground that the court below rendered a decision in conflict with the decision of another Court of Appeals on the same matter or in conflict with any applicable decision of this Court.*

While acts of City Officials motivated by a desire to protect the personal safety of citizens and maintain law and order or prevent economical injury to the City might not

always justify a deprivation of constitutional rights, *this is not the issue here.* On the other hand, there being no discrimination, Petitioners have no constitutional rights to the maintenance by a City of public swimming pools or the performance by a City of this proprietary function of furnishing this particular recreational facility. Having no such constitutional right, they are deprived of none.

No Court of Appeals of any other Circuit has held that any citizen has any constitutional right to the availability of public swimming pools, *where there is no discrimination.* Petitioners have cited none. In fact, every Circuit Court of Appeals and District Court where the exact issue has been presented has held that there is no such Constitutional right.

The holding in this case of the Fifth Circuit is in accord with its previous holding in *City of Montgomery* v. *Gilmore*, C.A. 5, 277 F. 2d 364, where the issue was the right of the City to close its parks. There that Court held:

> "We agree with the district court that no law, State or Federal, requires the City to operate public parks.
>
> . . .
>
> "In its resolution closing the parks, the Board of Commissioners . . . stated that, 'the members of the Commission are of the opinion that it is to the best interests of the citizens of Montgomery that said parks be closed.' That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Construction of the United States."

Also, see the opinion of the Fifth Circuit in *Hampton* v. *City of Jacksonville*, 304 F. 2d 319.

In *Tonkins* v. *City of Greensboro*, D.C. N.C., 162 F.Supp. 549, 175 F.Supp. 478, affirmed C.A.4, 276 F. 2d 890, there was involved the issue as to whether or not the City had

the right to close the pools rather than operate them on a integrated basis. The Courts answered this question in th affirmative and held that no person had a constitutiona right to swim in a public pool. The Court stated:

"With respect to the right of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool on the same terms and conditions applicable to white citizens, this would appear to be a moot question. The City of Greensboro, through its City Council, is firmly committed to a permanent closing and sale of the pool. . . .

"The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our Courts, *but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.*

• • •

"In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. *No person has any constitutional right to swim in a public pool.* All citizens do have the right, however, if a swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone.

• • •

"In Clark v. Flory, D.C.E.D.S.C. 1956, 141 F.Supp. 248, 250 affirmed, 4 Cir., 1956, 237 F. 2d 597, where action was brought to restrain enforcement of segregation statutes in use of state park, the Court stated:

"'No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park.'

"In Simkins v. City of Greensboro, D.C.M.D.N.C. 1957, 149 F.Supp. 562, it was held that a municipality was not required to furnish a golf course for its citizens but if it undertakes to do so out of public treasury, it cannot constitutionally furnish such facilities to a part of its citizens and deny them to others similarly situated."[3]

In *Wood* v. *Vaughan,* D.C. Va., 209 F.Supp. 106, affirmed C.A. 4, 321 F. 2d 474, the Court made the following comment:

". . . Obviously the city officials realized that they could not legally maintain segregation in the pools and chose the course of abandoning the use of these facili-

[3] Quotation is from 162 F. Supp. 549.

> ties rather than to desegregate them—a course that, where swimming pools are concerned, has been followed by many, if not all, of the southern cities in which the question has arisen. . . ."

The same result was reached in *Walker* v. *Shaw*, D.C. S.C., 209 F.Supp. 569, dealing with the right of the City of Greenville, South Carolina, to close its public skating rinks.

In *Lagarde* v. *Recreation & Park Commission*, D.C. La., 229 F.Supp. 379, the Court held:

> "There is no legal obligation or duty on the part of the City or Parish to provide or operate any public recreational facilities. . . ."

In *Willie* v. *Harris County*, Tex., 202 F.Supp. 549, the Court pointed out that there was no constitutional compulsion which directed a state or its subdivisions to furnish recreational facilities.

With all swimming pools in the City of Jackson now closed and closed since 1963 there is no question of any discrimination on account of race and therefore no question arises under the Fourteenth Amendment to the Constitution.

Nor is the decision of the Fifth Circuit Court of Appeals in this case in conflict with any applicable decision of this Court.

Petitioners rely on *Griffin* v. *The County School Board of Prince Edward County, Virginia*, 377 U.S. 218, 12 L.ed.2d 256, involving the closing of the public schools in Prince Edward County, Virginia.

The relationship of a government to the operation of the public schools is not comparable to the furnishing of a recreational facility such as a swimming pool. The furnishing

of such recreational facilities is the exercise of the discretionary proprietary power of a local government, while the operation of public schools is the exercise of a governmental power, usually required by the state laws or by constitutional provisions.

In *Griffin* the Court merely held that there was discrimination against the petitioners and a denial of the equal protection of the law under the Fourteenth Amendment for two reasons:

(1) The state was discriminating against Petitioners in that it was by public statewide taxation supporting the public schools in every other county of the state except in Prince Edward County.

(2) Both the county and state were discriminating against petitioners, in that they both contributed to the support of private schools in Prince Edward County, but not to any public schools therein.

That this was the basis for the holding of a denial of constitutional rights clearly appears from the following language in the opinion:

> "For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students, they represent the equal protection of the laws guaranteed by the Fourteenth Amendment.
>
> • • •
>
> "... The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools.
>
> • • •

". . . Accordingly, we agree with the District Court that closing the Prince Edward schools *and meanwhile contributing to the support of the private segregated white schools that took their place* denied petitioners the equal protection of the laws."

The Court in *Griffin* thus held that the children of all races had a right to public schools, if any children were being furnished such privileges. This is a far cry from a holding that any citizens of Jackson have a constitutional right to recreational facilities, such as a public swimming pool, when none of the citizens thereof are being furnished such facilities.

All other cases from this Court relied on by Petitioners involved actual discrimination on account of race or involved acts which promoted or statutes which authorized discrimination,[4] not involved here.

In fact the decision of the court below is in line with phraseology of *Evans* v. *Abney,* 24 L.ed.2d 634, 396 U.S. 613. There a city was allowed to relinquish and give up a part claiming that if integrated the title, under the terms of a will, would revert to the heirs. A court decision to that effect was affirmed, i.e., there was a factual basis for abandoning the park. Here Respondents claim the right to cease the operation of public swimming pools after the City Council determined that the operation of the same endangered public safety and law and order and would ad-

[4] For example, in *Jones* v. *Mayor,* 392 U.S. 409, 20 L.ed.2d 1189, the real issue was whether or not private discrimination on account of race was prohibited by 42 U.S.C. § 1982, as well as public discrimination. The discrimination involved was the lack of freedom of Negroes "to buy *whatever a white man could buy*". In *Anderson* v. *Martin,* 375 U.S. 399, 11 L.ed.2d 430, there was involved a statute providing that election documents designate the race of the candidate. While on its face it applied to all races it was held unconstitutional on the ground that equality was only superficial and that it actually *promoted* discrimination which made it invalid.

versely affect the economy of the City. The Court in *Evans* stated:

> "Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park facilities had it continued."

Here, as there, the effect of the decision of the City Council eliminated all discrimination against Negroes.

3. *There is not involved here any important question of Federal law which should be settled by this Court.*

Here there is not involved the broader question as to whether or not a City can close all its recreational facilities when they are integrated. Here the City of Jackson maintains and furnishes adequate recreational facilities on an integrated basis, i.e., golf links, zoo, parks, coliseum, etc. The swimming pools, used for only a few months of the year, were a minor luxury.

There is not presented here the broader question of whether a city can close a recreational facility without any factual justification therefor or merely because of racial animosity. The issue here involved is factually limited. The holding of the Court below only involves the closing of a recreational facility where there is a valid factual justification therefor, i.e., to preserve the safety and welfare of the public and the financial stability of the City.

The right of a city to cease to perform a particular proprietary function would vary depending upon the par-

ticular function involved and the factual justification therefor. The burden on this Court of policing the factual justification for every such municipal action would be prohibitive.

It will be noted that in all of the above cited cases where the same question has arisen in courts of appeal that in no instance was the question considered of sufficient importance to justify a Petition for Certiorari. It will also be observed that in District Court cases above cited the question was not considered of sufficient importance to justify an appeal to a Court of Appeals.

As pointed out, any question of discrimination has been removed by the Clark decision and that issue is now moot.

The policy of this Court with reference to granting Writs of Certiorari is stated in *S. S. Monrose* v. *Carbon Black Export,* 359 U.S. 180, 3 L.ed.2d 723, as follows:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." (P. 726)

In *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 67 L.ed. 712, the Court in dismissing a Writ of Certiorari improvidently granted, commented on the burdened docket of this Court and then stated:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embar-

rassing conflict of opinion and authority between the circuit courts of appeal."

In *Lee Moor* v. *Railroad,* 297 U.S. 101, 80 L.ed. 509, this Court commented on the hesitancy with which it would grant a Writ of Certiorari in a case involving a mandatory injunction which is granted or refused in the exercise of sound judicial discretion of the lower courts.

Conclusion

For the above reasons we respectfully submit that a Writ of Certiorari should not issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 23841

HAZEL PALMER et al., *Appellants,*

v.

ALLEN C. THOMPSON, Mayor, City of Jackson et al., *Appellees.*

Aug. 29, 1967.

Class action by Negro citizens and residents of city to enjoin certain city officials from certain allegedly discriminatory conduct. The United States District Court of Mississippi, William Harold Cox, Chief Judge, rendered judgment denying relief and appeal was taken. The Court of Appeals, Rives, Circuit Judge, held that city may abandon operation of segregated public swimming pools to prevent them from being desegregated without violating equal protection clause of federal Constitution when swimming pools cannot be operated economically or safely as integrated pools.

Affirmed.

(WEST KEY NUMBER SYSTEM)

1. Constitutional Law (Key) 217

City may abandon operation of segregated public swimming pools to prevent them from being desegregated without violating equal protection clause of federal Constitution when swimming pools cannot be operated economically or safely as integrated pools.

2. Injunction (Key) 118(2)

Standing to enjoin discrimination in operation of nonrecreational facilities must be apparent from the complaint.

3. Constitutional Law (Key) 42

Normally person cannot challenge constitutionality of statute unless he shows that he himself is injured by its operation.

4. Constitutional Law (Key) 42

Party challenging alleged segregation in operation of non-recreational public facility lacks standing to challenge alleged discrimination unless he has been aggrieved and either he or class of which he is a member may be aggrieved by the use of the segregated facility. U.S.C.A. Const. Amend. 14.

5. Constitutional Law (Key) 42

Person challenging constitutionality of segregated jail facility lacks standing to bring suit unless he is presently incarcerated or is threatened by government officials with incarceration. U.S.C.A. Const. Amend. 14.

6. Constitutional Law (Key) 42

All Negroes are not members of the class consisting of those Negroes threatened with or subjected to imprisonment in segregated jail facilities and only those Negroes presently incarcerated or threatened by government officials with incarceration have standing to challenge constitutionality of statute providing for segregation of prisoners. U.S.C.A. Const. Amend. 14.

7. Action (Key) 13

Only in exceptional circumstances where it would be difficult if not impossible for persons whose rights are being denied to present their grievances to the courts may a third party raise another's rights.

8. Federal Civil Procedure (Key) 656

Pleadings may be liberally construed.

L. H. Rosenthal, Jackson, Miss., Paul A. Rosen, Detroit, Mich., for appellants.

Thomas H. Watkins, E. W. Stennett, Jackson, Miss., for appellees.

Before RIVES, COLEMAN and GODBOLD, Circuit Judges.

RIVES, Circuit Judge.

Twelve Negro citizens and residents of Jackson, Mississippi, on their own behalf and "on behalf of the thousands of their fellow Negro citizens and residents * * * who are similarly situated because of race and color," filed a complaint against the Mayor and Commissioners of Jackson, its Police Chief, and its Director of Recreation, seeking to enjoin their allegedly discriminatory conduct. After joinder of issue and the filing of affidavits and stipulations showing the facts, the case was submitted to the district court for final decree on its merits. The court found that the plaintiffs were not entitled to any of the relief prayed and dismissed the complaint. On appeal, the plaintiffs seek review on two points stated in their brief as follows:

"First Point

"Where a local government closes its previously segregated public facilities to avoid a judgment declaring that Negroes have a right to use the facilities on an integrated basis, the closing violates the equal protection clause of the Constitution of the United States and Negro residents have a cause of action against the local government to compel re-opening of the facilities. The trial court erred in denying appellants' request for injunctive relief from appellees' discriminatory closing of the pools.

"Second Point

"Segregation of the races in municipal jails is forbidden by the Fourteenth Amendment. Where segregation of public facilities is pursuant to a state statute, such statute, is unconstitutional as contrary to the Fourteenth Amendment, and the trial court erred in denying appellants' request to enjoin operation of such facilities in a segregated manner."

There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous. Rule 52(a), Fed.R.Civil P. As to the swimming pools, the district court found the facts as follows:

> "The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of Clark v. Thompson, 206 F. Supp. 539, affirmed 313 F. 2d 637, cert. den. 376 [375] U.S. 951, 84 S. Ct. 440, 11 L.Ed.2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

The district court's conclusions of law relating to the operation of the swimming pools were:

> "The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. City of Montgomery v. Gilmore, U.S.C.A. 5th, 277 F.2d 564 [364]; Lagrade v. Recreation & Park Commission, D.C. La., 229 F. Supp. 379. No person has a constitu-

> tional right to swim in a public pool. Tonkins v. City of Greensboro, D.C. N.C., 162 F. Supp. 549. Where a public facility is closed to members of all races, any issue as to discrimination becomes moot. Clark v. Flory, U.S.C.A. 4th, 237 F.2d 597; Wood v. Vaughan, D.C.Va., 209 F. Supp. 106; Walker v. Shaw, D.C.S.C., 209 F. Supp. 569."

[1] The appellants urge that the City may not abandon the operation of public swimming pools to prevent them from being desegregated, and that to do so is contrary to the teaching of Mulkey v. Reitman, 1966, 64 Cal.2d 529, 413 P.2d 825, aff'd, May 29, 1967, U.S. No. 483, Oct. Term 1966, and of Griffin v. County School Board of Price Edward County, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256. In our opinion, the holding in neither of these two cases extends so far as to prevent the City from closing its swimming pools when they cannot be operated economically or safely as integrated pools.

The basic holding in Mulkey v. Reitman, according to our understanding, was that the State had become significantly involved in private discriminations against Negroes concerning residential housing. In *Griffin* the Supreme Court held that,

> "For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment." 377 U.S. at 225, 84 S.Ct. at 1230.

The Court further held that, "Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." 377 U.S. at 232, 84 S.Ct. at 1234. Neither those cases nor any other authority

can permit a federal court to require a city to operate public swimming pools when to do so would endanger the personal safety of the city's citizens and the maintenance of law and order.[1]

• • • • •

[1] We further agree with the finding of the district court that no racial discrimination was involved in the City's cancellation of its lease covering the Leavell Woods swimming pool.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23841

HAZEL PALMER, et al., *Appellants,*

versus

ALLEN C. THOMPSON, Mayor, City of Jackson, et al., *Appellees.*

OPINIONS OF THE COURT OF APPEALS

Appeal from the United States District Court for the Southern District of Mississippi

(October 9, 1969)

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.*

Rives, Circuit Judge: The briefs and arguments on rehearing en banc have been confined to the first point discussed in the original opinion; that is, to whether the City of Jackson denied the equal protection of the laws to Negroes by the closing of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

> "The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark* v. *Thompson*, 206 F. Supp. 539, affirmed 313 F. 2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time,

* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his last illness which disabled him from any further participation or action.

and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton* v. *Wilmington Parking Authority, supra* [365 U.S. 715], at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans* v. *Newton*, 1966, 382 U.S. 299, 300.[1] So doing, we search for further facts and circumstances.

First, it should be noted that the district court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

"• • • that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

[1] To like effect, see Reitman v. Mulkey, 1967, 387 U.S. 369, 378.

> "It is further stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark* v. *Thompson*, cited by the district court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

> "Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.
>
> "All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the

years 1960, 1961 and 1962, from which it appears that there was an average annual loss of $11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

If so, then the plaintiffs must prevail, for "• • • law and order are not • • • to be preserved by depriving the Negro children of their constitutional rights."[2] Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[3] For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,[4] the governing of a company town,[5] the operation or

[2] Cooper v. Aaron, 1958, 358 U.S. 1, 16.

[3] Buchanan v. Warley, 1917, 245 U.S. 60, 81.

[4] Nixon v. Condon, 1932, 286 U.S. 73; Smith v. Allwright, 1944, 321 U.S. 649; Terry v. Adams, 1953, 345 U.S. 461.

[5] March v. Alabama, 1946, 326 U.S. 501.

provision for the operation of a public utility,[6] or the operation and financing of public schools.[7]

Under the impetus of the declaratory judgment in *Clark* v. *Thompson, supra,* the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable discretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies [8] and as to the desegregation of the public schools.[9] The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality are of

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[6] Public Utilities Comm'n v. Pollak, 1952, 343 U.S. 451; Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 724; Boman v. Birmingham Transit Co., 5 Cir. 1960, 280 F.2d 531; Baldwin v. Morgan, 5 Cir. 1961, 287 F.2d 750, 755.

[7] Brown v. Board of Education, 1954, 347 U.S. 483, 493; Guillory v. Tulane University, E.D. La. 1962, 203 F.Supp. 855, 850, 863; Hobson v. Hansen, D.D.C. 1967, 269 F. Supp. 401.

[8] Reynolds v. Sims, 1964, 377 U.S. 533.

[9] Brown v. Board of Education, 1954, 347 U.S. 483; Shuttlesworth v. Birmingham Board of Education, N.D. Ala. 1958, 162 F.Supp, 372, 379, 381, *aff'd,* 358 U.S. 101.

the same race, the closing of all municipal pools would embody no unconstitutional action or result.[10]

Attempts to analogize this case to *Reitman* v. *Mulkey*, 1967, 387 U.S. 369, and *Griffin* v. *School Board of Prince Edward County*, 1964, 377 U.S. 218, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significant state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,[11] the Court

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[10] Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as Hunter v. Pittsburgh, 1907, 207 U.S. 161, 177, 178. See in this regard, Gomillion v. Lightfoot, 1960, 364 U.S. 339, 342-43.

[11] On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, but that Virginia law treated "the school children of Prince Edward County differently from the way it treats the school children of all other Virginia counties." Id.

pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-31. Pretermitting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans* v. *Newton*, 1966, 382 U.S. 296, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment," 382 U.S. at 302. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301. In the case at bar, of course, there may well be inferred a "tradition of municipal control," but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the parks in *Evans* v. *Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301.

Appellants have urged a theory other than those suggested explicitly by *Reitman, Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a

badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawl of any badge of equality.

Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.[12] Therein, it is said, lies a fatal aspect of the alleged removal of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a r[illegible] municipal action. In this context, the argument [illegible] little legal significance. The equal protection clause [illegible] not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

Motive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights. See, *e.g.*, *Griffin* v. *School Board of Prince Edward County*, *supra*, and *Gomillion* v. *Lightfoot*, *supra*, n. 10. *Griffin*, *supra*, at 231, uses the expression that, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial

[12] One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, *e.g.*, Evans v. Newton, 1966, 382 U.S. 299, 302, citing Terry v. Adams, 1953, 345 U.S. 461; Public Utilities Comm'n v. Pollak, 1952, 343 U.S. 451; Marsh v. Alabama, 1946, 326 U.S. 501.

segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,[13] the operation of the public schools,[14] and the selection of jurors.[15] In dismissing this complaint, after considering the affidavits and testimony, the district court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is Affirmed.

Chief Judge Brown, Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Godbold and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

[13] Hirabayashi v. United States, 1943, 320 U.S. 81, 100.

[14] Shuttlesworth v. Birmingham Board of Education, *supra*, n. 9; see also Darby v. Daniel, S.D. Miss. 1958, 168 F.Supp. 170, 186.

[15] Brooks v. Beto, 5 Cir. 1966, 366 F.2d 1, 25.